IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID EBERSOLE,	§	
	§	No. 476, 2010
Employee Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
EVANS BUILDERS,	§	C.A. No. 09A-09-002
	§	
Employer Below-Appellee.	§	
	§	

Submitted: January 11, 2011
Decided: February 7, 2011

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

O R D E R

This 7th day of February 2011, it appears to the Court that:

(1) Claimant-Below/Appellant, David Ebersole, appeals from a Superior Court order, which affirmed an Industrial Accident Board ("Board") decision to deny Ebersole's petition to determine compensation due. Ebersole raises two arguments on appeal. First, Ebersole contends that the Board hearing officer should have recused herself. Second, Ebersole contends that the Board's decision is not supported by substantial evidence. Because we find merit to Ebersole's first argument, we must reverse and remand.

(2) Ebersole has a history of pulmonary problems. In the 1970s, Ebersole suffered a spontaneous pneumothorax. In the 1980s, physicians discovered a

fungus spore on Ebersole's right lung. Although he recently stopped smoking, Ebersole smoked a pack of cigarettes a day for twenty-five to thirty years. Ebersole has suffered from chronic obstructive pulmonary disease ("COPD"). He also has suffered from pneumonia several times.

(3) Ebersole began working for Evans Builders approximately seven years ago. In that capacity, he regularly worked at chicken processing facilities. Approximately two and one-half years ago, Ebersole was hospitalized after he developed mycobacterium avium complex ("MAC"). Thereafter, he filed a petition to determine compensation due, alleging that his work for Evans Builders caused him to develop MAC.

(4) The Board, through a hearing officer and two Board members, held a hearing. Dr. Peter Bandera testified by deposition as an expert witness for Ebersole. Bandera testified that Ebersole developed MAC as a result of "work related exposure" and that "the usual source of the infection is environmental or animals." Bandera also testified that Ebersole had a predisposition to the condition, as "he certainly was fragile." Dr. Albert Rizzo testified by deposition as an expert witness for Evans Builders. Rizzo testified that most pulmonary physicians believe that MAC results from "an individual having previous pulmonary problems, chronic lung disease such as COPD, previous cavities in the lung, sarcoidosis, things of that nature." Rizzo also testified that there was not a

relationship between Ebersole's development of MAC and Ebersole's work at the chicken processing facilities.

(5) The Board denied Ebersole's petition, explaining that it found the opinion of Rizzo, a pulmonoligist, to be more persuasive as to causation on pulmonoligcal illness than Bandera, a pain management doctor. Ebersole appealed the Board's decision to the Superior Court, which affirmed. This appeal followed.

(6) The timing of the Board's hearing, the Board's decision, and the hiring of the hearing officer is important to this appeal. The law firm that represented Evans Builders scheduled an interview with the hearing officer for November 21, 2007. But that interview was cancelled after a conflict arose. The Board then held the hearing on Ebersole's petition on March 6, 2009. The hearing officer eventually interviewed with the law firm on April 14, 2009, and joined the firm as an associate on May 26, 2009. The Board issued the decision that denied Ebersole's petition on July 30, 2009.

(7) We review a decision of the Board for errors of law and determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law.[1] "Substantial evidence equates to 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[2] We will not

[1] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (citing *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Super. Mar. 24, 2008)).
[2] *Id.* (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

weigh the evidence, determine questions of credibility, or make our own factual findings.[3] Errors of law are reviewed *de novo*.[4] Absent an error of law, the standard of review for a Board's decision is abuse of discretion.[5]

(8) Ebersole argues that the hearing officer should have recused herself. When addressing a motion for recusal on grounds of personal bias or prejudice, a judge must engage in a two-part analysis.[6] First, the judge must subjectively determine that she can proceed to hear the case free of bias or prejudice.[7] Second, if the judge has determined subjectively that she has no bias, then she must determine objectively whether there is an appearance of bias sufficient to cause doubt about her impartiality.[8] If an objective observer viewing the circumstances would conclude that a fair or impartial hearing is unlikely, recusal is appropriate.[9] On appeal, we review the merits of the objective analysis *de novo*.[10] We have applied this standard to Board hearing officers. For example, in *Home Paramount*

[3] *Id.* (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66–67 (Del. 1965)).
[4] *Id.*
[5] *Id.* (citing *Stanley*, 2008 WL 2410212, at *2).
[6] *Fritzinger v. State*, --- A.3d ----, 2010 WL 5080937, at *5 (Del. Dec. 13, 2010) (citing *Los v. Los*, 595 A.2d 381, 384 (Del. 1991)).
[7] *Id.* (citing *Los*, 595 A.2d at 384–85).
[8] *Id.* (citing *Los*, 595 A.2d at 385).
[9] *Id.* (citing *Gattis v. State*, 955 A.2d 1276, 1285 (Del. 2008)).
[10] *Id.*

Pest Control v. Gibbs,[11] we required a hearing officer to recuse herself "in order to promote public trust and confidence in our judicial system."[12]

(9) Ebersole became aware of the ground for recusal only after the Board had issued its decision. Consequently, there is neither a record of the hearing officer's subjective belief, nor an analysis under the objective prong. In *Fritzinger v. State*, we similarly reviewed a recusal claim without a full record.[13] There, we focused on the objective prong and ultimately remanded the case.[14] In this case, we also should inquire whether, objectively, there is an appearance of bias sufficient to cause doubt on the hearing officer's impartiality. Here, the hearing officer participated at the hearing -- asking questions of the witnesses. Although the hearing officer was not authorized to issue the final decision,[15] she was authorized to perform various other tasks, which included "advising the Board [on] legal issues and writing the Board's decision."[16] The hearing officer was also permitted to be "present during [the] deliberations for the purpose of providing

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[11] 953 A.2d 219 (Del. 2008).
[12] *Id.* at 222. In *Gibbs*, the hearing officer, approximately six years earlier, had filed a petition nearly identical to the employee's petition over which she presided. *Id.* For the hearing officer's prior petition, she hired an attorney from the same firm that represented the employee; her employer was represented by an attorney from the same firm that represented the employer; and the two employers' medical experts were partners in the same practice. *Id.* We reversed the Board's decision because "a person knowing this unusual overlap in both the claim and the participants would have a reasonable basis to question her impartiality." *Id.*
[13] *See Fritzinger*, 2010 WL 5080937, at *5–7.
[14] *See id.*
[15] The parties may provide that authorization pursuant to title 19, section 2301B(a)(4) of the Delaware Code, but they chose not to do so here.
[16] 19 *Del. C.* § 2301B(a)(5).

legal advice."[17] Given the hearing officer's duties and the fact that, between the time of the hearing and the decision, the hearing officer interviewed with and began working for the law firm that represented the employer in this case, the hearing officer should have recused herself. An objective observer, particularly one without knowledge of her specific duties in this case, would view these circumstances with great suspicion.[18] This result is necessary "in order to promote public trust and confidence in our judicial system."[19]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and **REMANDED**.[20]

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[17] *Id.*
[18] *See Fritzinger*, 2010 WL 5080937, at *5 (citing *Gattis*, 955 A.2d at 1285).
[19] *See Gibbs*, 953 A.2d at 222.
[20] Because we conclude that the hearing officer should have recused herself, we need not address Ebersole's second argument -- whether the Board's decision is supported by substantial evidence.